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Right to education (articles 13 and 14 of the Covenant)

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Right to education: survey and prospects

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Introduction

1. For many years now, the International Organization for the Development of Freedom of Education (OIDEL) has been cooperating with the Committee on Economic, Social and Cultural Rights in connection with the drafting of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The right to education, OIDEL's principal subject of study, is typically a right which calls for a global approach. It clearly illustrates the unity of the various legal instruments relating to human rights. The right to education, as a right with a civil, political, economic, social and cultural character, has not yet been approached in a systematic and comprehensive manner.

2. This study, which has been undertaken for the Committee on Economic, Social and Cultural Rights, contains a number of suggested pointers for the guidance of the experts, with a view to the formulation of a clear doctrine on the question of the right to education. The interest expressed in recent months by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and now the Committee on Economic, Social and Cultural Rights has prompted OIDEL to produce this study on the present status of the question of the right to education and on prospects for development of this right, and to organize, on 8 August 1998, an international seminar on the right to education. This seminar, which was attended by some 20 experts, made a valuable contribution to the study of the question and opened up numerous prospects for the future. OIDEL hopes that this brief study will contribute to progress in analysis of the right to education, and specifically of the content of article 13 of the International Covenant on Economic, Social and Cultural Rights.

3. As noted by Stephen P. Heyneman, 1/ questions relating to trade, health, agriculture and science have always constituted a subject of international research, whereas education has often been relegated to the rank of private and domestic questions. However, the situation is changing. In almost all countries, education systems are in a state of crisis: teachers increasingly confronted with not only pedagogical, but educational and human problems, constantly rising costs with no certainty that they will achieve favourable results; traditional training unsuited to the demands of the economy. These are some of the major challenges confronting education systems which urgently raise the question of a far-reaching reform of the education policy of States. 2/

4. The question of education, which was for a long time confined to the technical domain, is nowadays approached in a much more fundamental manner in terms of its human rights dimension. In fact, the international legal instruments relating to human rights dwell at length on the question of education but it is not always possible to grasp the practical implications which may be derived from texts describing, albeit in a fairly satisfactory manner, the content of what is called the right to education. To speak of the right to education is not to posit it simply as a demand. It is, on the contrary, to take account, in the specific domain of the family, school and society as a whole, of the need for education as it manifests itself in any person.

5. The following preliminary observation should be made: the established term "right to education" could be taken to mean that it is limited simply to the right to be educated. We will show that, on the contrary, the expression designates a whole set of formulations which should be termed "educational rights". The right to education, as formulated in the international instruments and as it should define doctrine, not only concerns the right to benefit from an education, but also spells out the conditions in which this right may actually and fully be translated into reality.

6. Consequently, the objective of our brief study will be precisely to establish the true content of the right to education. After a "survey" of the legal instruments, we will present the elements which should, in our opinion, be included in a complete "doctrine" of the right to education, with the implications of this doctrine for the education policy of States. However, in order to avoid expressing mere pious hopes, we will also have to propose courses of analysis on the question of the "indicators" relating to the right to education, since a genuine examination of the right is also dependent on the formulation of a measuring instrument capable of determining, with the greatest possible objectivity, whether the content of a legal instrument is genuinely put into effect in the specific field of education.

I. EDUCATIONAL RIGHTS FINALLY CONSIDERED

7. We referred above to the existence of a huge legal arsenal relating to the right to education. We must now present the essential texts. 3/

A. The legal instruments relating to the right to education

8. The Universal Declaration of Human Rights mentions the right to education in its preamble already: teaching and education are referred to as means of developing respect for human rights and ensuring the effective recognition and recommendation of those rights. This element of the development of the personality is taken up by the Convention on the Rights of the Child.

> "The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement ... to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and ... to secure their universal and effective recognition and observance ...".
>
> (Universal Declaration of Human Rights)

> "Art. 28: States Parties recognize the right of the child to education ... Art. 29: (They) agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical ability ...".
>
> (Convention on the Rights of the Child)

9. The Universal Declaration of Human Rights also proclaims the right to education for all and states that the primary aim of education is the development of the human personality; it reiterates the wish that this education should promote respect for human rights and fundamental freedoms. It also recalls the rights of parents to choose the education they wish for their children.

> "Art. 26: 1. Everyone has the right to education .... 2. Education shall be directed to the full development of the human personality, and to the strengthening of respect for human rights and fundamental freedoms .... 3. Parents have a prior right to choose the kind of education that shall be given to their children".

10. The International Covenant on Economic, Social and Cultural Rights reaffirms the same elements.

> "Art. 13: 1. ... education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. ... 3. ... The States parties ... undertake to have respect for the liberty of parents ... to choose for their children schools, other than those established by the public authorities ...".

11. The International Covenant on Civil and Political Rights also refers to this parental freedom in the more general context of the right to freedom of thought, conscience and religion.

> "Art. 18: 1. Everyone shall have the right to freedom of thought, conscience and religion. ... 4. The States Parties ... undertake to have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions".

12. Reference may also be made, in another context, to resolution I.9 of the European Parliament of 14 March 1984 on freedom of education in the European Community. This resolution repeats the essential elements of the United Nations instruments, while stipulating that freedom of education and teaching is also dependent on the granting of the right to open a school and provide teaching in it. The resolution also provides that the parents' freedom of choice must not give rise to financial constraints on them. It further states:

> "In accordance with the right to freedom of education, Member States shall be required to provide the financial means whereby this right can be exercised in practice, and to make the necessary pulic grants to enable schools to carry out their tasks and fulfil their duties under the same conditions as in corresponding State establishments, without discrimination as regards administration, parents, pupils or staff;
>
> "Notwithstanding this, however, freely established schools shall be required to make a certain contribution of their own as a token of their own responsibility and as a means of supporting their independent status." 4/

B. Summary of what is theoretically established

13. Although the international instruments open up many perspectives, they have not yet been fully utilized. It may, however, be stated that a number of elements have generally been established and that a general consensus is emerging on the following points:

(a) Every person has the right to education; conversely, therefore, there is a duty to instruct;

(b) The priority aim of education is the development of the individual; the primary objective of education therefore resides first in the person educated, and only subsequently in the social relational context, which is evoked from the standpoint of human rights. The international instruments appear to take it for granted that the right to education implies the right to be trained in the spirit promoted by the Universal Declaration of Human Rights;

(c) Lastly, there is a consensus that it is the parents who possess educational responsibility and authority, even if the definition of the scope of this authority in educational matters is somewhat ambiguous.

C. New perspectives

14. At its forty-ninth session in August 1997, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted a resolution entitled "The realization of the right to education, including education in human rights". The question of the right to education - together with the question of human rights education - is in fact on the agenda of the Sub-Commission for the duration of the United Nations Decade for Human Rights Education (1995-2004). In the same resolution, the Sub-Commission requested Mr. Mehedi to prepare a paper on the right to education with the purpose of explaining "the content of the right to education, taking account, in particular, of its social dimension and the freedoms it includes and of its dual civil and political rights and economic, social and cultural character, and to identify ways and means of promoting human rights education". This paper was submitted to the Sub-Commission at its fiftieth session in August 1998 (E/CN.4/Sub.2/1998/10).

15. The inclusion of this question on the Sub-Commission's agenda provides an opportunity for furthering analysis at the international level. This opportunity was promptly seized by the Commission on Human Rights, which, at its forty-fourth session, decided to appoint a special rapporteur, whose mandate will focus on the right to education (resolution 1998/33). The Committee on Economic, Social and Cultural Rights has also taken up the question in 1998.

16. So it is the very status of the right to education that has evolved in spectacular fashion, an evolution which was in fact hailed - exceptionally - by the General Assembly of the United Nations in resolution 52/127 of 12 December 1997. 5/

II. ELEMENTS OF DOCTRINE

17. In this section we shall suggest the elements which should appear in a comprehensive doctrine on educational rights.

A. Education for what purpose? The objectives of education

1. The beneficiaries of education

18. What is the subject of the right to education? Is the prime purpose of education to enable society to rely on competent or responsible members? Is its prime purpose to enable the child and the adolescent to realize their potential and to develop? There is nothing academic about this question: it arises in connection with the school as soon as consideration has to be given to a pedagogical plan, for example for the purpose of setting up a school. As we have seen, the various international instruments are in agreement that priority lies in the individual, and hence in the second of our alternatives. But this does not solve the question, since personal development cannot be conceived outside harmonious social integration and within a society functioning in conditions which enable its members to develop. And the question is rendered even more complex by the fact that the principal subject of law is generally a minor, hence a person dependent on his legal representative; it must be acknowledged that this latter problem is not dealt with in very explicit fashion in the international instruments.

2. Personal development and development of human rights

19. In analysing what appeared to us to constitute a legal consensus on the right to education, we referred to the general agreement on the question of the personal development of the pupil. In this context, the development of the pupil is obviously related to the fact that the rights inherent in his dignity must be respected for his sake, in other words, that human rights must be respected. He himself and his legal representatives will become aware of these rights insofar as the rights have been taught. For this reason, many authors consider that the right to education and human rights education are closely linked. The above-mentioned resolution of the Sub-Commission also establishes this link.

20. A specialist on this question, Manfred Nowak, 6/ integrates, for example, the question of human rights education with the elements of a consensus which he considers to have been achieved. In his view, there is universal agreement that education: (a) allows man freely to develop his personality and dignity; (b) allows his active participation in social life in a spirit of tolerance; (c) respects parents, national values and concern for the environment; (d) contributes to the development of human rights. Even though other authors prefer to deal separately with the question of the right to education and that of human rights education, it may be stated that a link exists between the two subjects and that the doctrine being formulated will have to make a point of clearly linking these aspects with each other.

3. Perspectives opened up by the Delors report

21. With regard to the objectives of education, the report of the International Commission on Education for the Twenty-first Century proposes some interesting pointers:

> "If it is to succeed in its tasks, education must be organized around four fundamental types of learning which, throughout a person's life, will in a way be the pillars of knowledge: learning to know, that is acquiring the instruments of understanding; learning to do, so as to be able to act creatively on one's environment; learning to live together, so as to participate and cooperate with other people in all human activities; and learning to be, an essential progression which proceeds from the previous three. Of course, these four paths of knowledge all form a whole, because there are many points of contact, intersection and exchange among them." 7/

One of the merits of this analysis is that it maintains a steady balance between the personal dimension of education and its social repercussions. In this study we cannot outline all the interesting consequences drawn by the Delors Commission from this fourfold conviction. We would merely state that the Commission clearly notes that the practical achievement of these objectives is necessarily dependent on a flexible and pluralist education policy. Once it is accepted that the individual is at the centre of the debate, his education can no longer be conducted within a rigid and uniform system. Taking account of the individual implies, de facto, openness to pluralism and respect for differences.

B. Education as a cross-sectoral right

22. In human rights jargon, there is frequent mention of first-generation rights when speaking of the rights contained in the International Covenant on Civil and Political Rights, and of second-generation rights in connection with those contained in the International Covenant on Economic, Social and Cultural Rights. Today, it may be said in passing, a third generation of rights is emerging: the solidarity rights.

23. The expression "cross-sectoral nature of the right to education" designates the fact that this right is contained within the bodies of both first and second-generation rights. It should also be realized that the right to education is not the only cross-sectoral right: we shall see below that cultural rights, for example, also possess this characteristic. Thus, all the work which is to be done on the question of the cross-sectoral nature of the right to education may contribute to a similar analysis in other fields.

1. The social dimension of the right to education

24. The right to education therefore appears in the International Covenant on Economic, Social and Cultural Rights. It is, according to Nowak, based on a philosophy "which holds that human rights can only be guaranteed by positive State action. Consequently, the right to education obliges States to develop and maintain a system of schools and other educational institutions in order to provide education to everybody, if possible, free of charge. Like the

right to work (the most fundamental economic right) and the right to an adequate standard of living (the most comprehensive social right), the right to education is regarded as one of the basic means needed by a human being to develop his or her personality". 8/

25. In the specific area of education, it is true that the current trend is to ask ever more of the State, and notably financial resources. Demands in this area often concern financial resources alone, under the illusion that educational problems relate first and foremost to the economy. It would be easy to show, although this would not get us very far, that educational success, conceived in accordance with the criteria mentioned above, depends only very secondarily on financial resources. In this connection, reference may be made to a study conducted in Switzerland, where the massive injection of money into an education system proved useless, except in order to highlight the fact that problems thought to be soluble by having money thrown at them were in practice of quite another dimension:

> "We know better today that it is not sufficient to increase the system's resources in order to combat failure and inequality effectively ... Although it may be concluded that the increase in resources is not sufficient, it obviously cannot be concluded that the increase is not necessary. It is the use of resources that must be questioned, the way they are put to work ... The evaluation in this case claims to be formative. In this sense, even though it may appear costly, the experiment is a positive one: the fact that it has been carried out demonstrates today that this strategy is not sufficient." 9/

The fact remains that the right to education undoubtedly possesses a social dimension, and future analysis will necessarily have to specify doctrine in order to know what can really be asked of the State and to define what is the responsibility of other bodies.

2. The freedom dimension

26. The right to education is also a civil and political right. Although "realization of the right to education demands an effort on the part of the State to make education available and accessible [and] implies positive State obligations, ... there is [also] the personal freedom of individuals to choose between State-organized and private education, which can be translated, for example, in parents' freedom to ensure their children's moral and religious education according to their own beliefs. From this stems the freedom of natural persons or legal entities to establish their own educational institutions. This is the aspect of freedom." 10/

27. The right to education is generally studied from its social standpoint. Even when the freedom of parents is mentioned, one always senses a certain reluctance to draw the full consequences of this dimension. Thus, for example, when it is stated that parents have the freedom to choose schools other than those of the public authorities, but adding that the State may establish educational standards for the so-called "free" schools, one understands that that raises a point which is, to say the least, open to interpretation. As soon as these standards become too binding, the parents

have the choice between schools which all do the same thing. Obviously, the freedom dimension of the right then loses all substance. In this connection, the point made by Delbrück should be mentioned:

> "One would be hard put to find any express reference to the value of a broad education with regard to the exercise of individual freedom as the basis of a socially responsible life in a free society. To be sure, the phrase in article 13 of the International Covenant on Economic, Social and Cultural Rights that 'education shall enable all persons to participate effectively in a free society' comes close to this fundamental aspect of education. But the phrase still seems to have a certain 'instrumental' ring in that it speaks of 'effective' participation in a free society, and it does not refer to the individual as the focal subject, but rather to collectivities like 'all persons' and 'society'. From this perspective, it looks as if the right to education is to be interpreted solely in terms of a social right which corresponds with an obligation of the State to provide for educational opportunities and - in exercising this right - subjects the child to mandatory education (at least at elementary level). But this may not be the final word on the matter. The question to be asked is whether it can be established that the right to education is also linked to the protection of individual freedom, i.e. the classical human rights concept, as it may be seen to be suggested by the reference of the human rights instruments analysed here to the goals of personal development, tolerance and respect for human rights." 11/

3. Linkage between freedom of education and the right to education

28. This latter observation enables us to state that the right to education is a right to benefit from an education chosen by the parents, within a "framework of responsibility and equity constituting the essential but limited role of the State" (Charles Glenn). In the specific field of freedom of education, it is no exaggeration to say that the role of the State often constitutes a genuine stumbling block:

(a) If the parents had the freedom to choose, what would become of the State's role?

(b) Is it not the role of the State to ensure social cohesion?

(c) Does not the parents' choice lead to a dismantling of education?

(d) Does not the State school constitute the guarantee of equality of opportunity?

29. The issue of the respective roles of civil society and the State in education is prominent in all these questions. The consideration of this topic by international bodies should therefore focus on the links between the rights and duties of the State and those of the citizen in the field of education. One of the main difficulties is undoubtedly defining a universal doctrine which is based on human rights and distinguishing it from those factors of legitimate cultural difference present in any given education system.

30. In the final analysis, the whole question of the cross-sectoral nature of the right to education is at issue. While, in general terms, the International Covenant on Civil and Political Rights establishes freedom of choice and the International Covenant on Economic, Social and Cultural Rights establishes the duties of the State, it must not be forgotten that both texts explicitly refer (in articles 46 and 24 respectively) to the provisions of the Charter of the United Nations:

> "Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations ...".

31. In other words, one generation of human rights cannot be used against another. In the field of concern to us, we could not demand freedom of education whilst denying that education is also a duty of the State. Conversely, the State's duty should not blind us to the fundamental rights of families and freedom of education. As Mr. J.L. Martínez López-Muñiz states:

> "The main legal and constitutional problem which the legal regime on education appears to face is precisely a certain downgrading or undervaluation of the primary and undeniable importance of freedom in this domain, an undervaluation which is claimed to be the price to be paid for guaranteeing the other constitutional dimension of the right to education for all, the provision of education". 12/

4. The freedom dimension and education for citizenship

32. On the question of promoting the freedom dimension of the right to education, one rapidly becomes aware of the difficulty of establishing a truly universal doctrine - universal in the sense that it conveys fundamental rights in terms of education, and not that it purports to set up a "worldwide education system" - since the issue is linked to that of the relationship between civil society and the State and therefore has strong ideological connotations.

33. However, there is another avenue of approach, undoubtedly underutilized at present, and that is education for citizenship. Civic education is, in Europe at least, everywhere enjoying a renaissance - for two main reasons:

(a) Firstly, having been judged bourgeois and out-of-touch in the 1970s, civic education was soon dispensed with, but since the world of education is, more than any other, subject to swings of the pendulum, civic education is now back with a vengeance under the less compromising name of "education for responsible citizenship"; 13/

(b) The second reason relates to citizens' decreasing interest in "public affairs", combined with a reluctance to take on responsibilities. It is well known that in a democracy abstention plays into the hands of the least democratic ideologies, which brings us back to our subject: how can we educate responsible citizens capable of commitment and discernment, and concerned about issues other than their own minor personal problems, if the citizens are educated in "factory schools" where the pupil has no personal contribution to make and the teacher, if possible, even less passively carrying out the official "programme". If we add to this the parents' failure

to assume responsibility, which teachers are the first to complain about, we can see that neglecting the freedom dimension of the right to education is hardly productive in terms of responsible citizenship.

34. Obviously, the picture sketched in this paper is to some extent a caricature. Nevertheless, beyond political or ideological differences, a broad consensus is emerging on the urgent need for education for personal and social responsibility and freedom; and it would be easy to demonstrate that the result of such an education can only be positive to the extent that the school itself becomes a forum for the freedom and responsibility of all those who have a role to play in education: pupils, parents and teachers. It should probably be stated that the right to education necessarily implies an obligation on the State (which is the first to benefit from it) to ensure that responsibility and freedom can be effectively exercised in the school environment.

C. The role of the State

35. This leaves the ground ready for a redefinition of the role of the State in our field. Obviously, we are not trying to draw up a dialectical opposition here between the rights of the citizen and the prerogatives of the State, but to devise new types of synergy.

36. With particular reference to the cross-sectoral nature of human rights, we might usefully refer at this point to the interesting distinctions drawn by Fons Coomans. Starting from the thoughts of A. Eide on the rights to food, the Limbourg principles and the Maastricht principles, Coomans attributes to the State a threefold obligation where education is concerned: "to respect", to "protect" and "to fulfil":

> "The first level is the 'obligation to respect'. This obligation prohibits the State itself from acting in contravention of recognized rights and freedoms. This means that the State must refrain from interfering with or constraining the exercise of such rights and freedoms. The second level is the 'obligation to protect'. This requires the State to take steps - through legislation or by other means - to prevent and prohibit the violation of individual rights and freedoms by third parties. The third level concerns the 'obligation to fulfil'. This obligation can be characterized as a programme obligation and implies more of a long-term view. In general, this will require a financial input which cannot be accomplished by individuals alone. This typology of obligations is applicable to economic, social and cultural rights as well as to civil and political rights. It demonstrates that the realization of a particular right may require either abstention or intervention on the part of Governments." 14/

It seems to us that these pointers could be extremely fruitful in drawing up a doctrine for the right to education which respects both the freedom dimension and the social dimension.

37. The State therefore has the obligation to respect individual freedoms. In the educational sphere, the essential choices must be made by the parents, and the State cannot take advantage of any supposed incompetence on their part

to wrest from them prerogatives established by human rights. The obligatio to protect establishes an important safeguard in allaying the frequently expressed fears that pressure groups, sects or various kinds of lobbies wi take over certain schools. In this respect, the State ensures that the fr and responsible citizen is not misled in his educational choices, and that has full and objective information. Finally, the obligation to fulfil the right, like the other levels of obligation, stems from the principle of subsidiarity and obliges the State to intervene in cases where individuals manifestly unable to act alone. This basically relates to issues linked t the financing of education. 15/

D. The right to education and academic freedom

38. So far we have mentioned the right to education only within the framework of the school. We are well aware that education does not end wi the secondary-school leaving certificate or the baccalaureat. The express used these days is "life-long education", and it would be ill-considered at the very least to limit our consideration of the right to education to the school alone. 16/

39. With the exception of a number of allusions to freedom of scientific research contained in the International Covenant on Economic, Social and Cultural Rights, it must be acknowledged that the international legal instruments are not very explicit as regards academic freedom, and teacher-training establishments may also be covered by the concept of academic freedom. The training of teachers - often carried out by the universities - is a case in point. If the State has obligations in the fi of education, obviously a significant part of these obligations consists o the training of future teachers. But at the same time, the freedom dimens still remains, requiring the existence of educational choice, which thus presupposes pluralism in terms of the academic training of teachers. At t academic level, as at the school level, it would appear essential that doctrine should promote both dimensions of the right to education. 17/

E. The right to education and cultural rights

40. Obviously, all that has just been said about the freedom dimension a the social dimension of the right to education may equally be said of cult rights, and surely even more of cultural rights since they are explicitly mentioned as belonging to the second generation of human rights (economic, social and cultural rights). But how can we limit cultural rights to the second generation of rights and not link them also with the issue of fundamental freedoms, such as freedom of conscience, opinion, expression, creation and communication, which belong to civil and political rights? T is not the end of the story, however. If we consider cultural rights simp insofar as they can be demanded from the State, we reduce culture - and education, which is a prerequisite for access to culture - to a mere consu product. 18/ Thus reduced to a consumer product which can be demanded fro the State, culture loses the very source of its dynamism, which flows from the participation, commitment and hence freedom of the players. More fundamentally still, and in parallel with the issue of the right to educat culture is par excellence a source of diversity and pluralism, and it is w known that a State benefit tends naturally towards uniformity. None of th

considerations can be ignored if we wish to advance the cause of the right to education. Conversely, whatever is drawn up in the United Nations bodies concerned with the right to education will inevitably have repercussions on the progress of cultural rights. Which shows, once again, how much is at stake.

F. The economic issue

41. We said above that education cannot be reduced to a matter of money. Nevertheless, the issue of financing education is also related to justice and thus to human rights. The financing of education may not be the first question to tackle, but it should nonetheless receive careful attention since there are forms of financing which permit the effective exercise of a right and others which prevent it. The freedom and financing of schools other than those run by the public authorities is a case in point, and is a well-known problem in many countries which are looking for new approaches in this area.

42. Beyond these technical aspects, we gladly ally ourselves with the analysis of many authors, among them Jacques Delors, who want to turn on its head the logic of analysis in this field, considering the sums spent on education as investments rather than simply expenditure. 19/ Economists will at this point measure the return on investment in education, although it must be pointed out with the utmost vigour that the right to education should not be analysed from the standpoint of economic profitability alone. If we take up Charles Glenn's thesis, already referred to, that the role of the State consists in establishing a framework of responsibility and equity, we can easily distinguish - in considering the issue of the right to education - between financing and supply of education. To put it clearly, we are calling for financing directed towards the subject - the pupil - rather than the object - the school, since supply can very easily, within certain framework conditions, come from civil society. 20/

43. Contrary to popular opinion, not all the work in this field remains to be done. Many new solutions for the financing of education already exist in broad outline, and several have been tried out. 21/ The fact that such experiments are still marginal is due partly to the lack of a general doctrine on the right to education and partly to the long-instilled habit of giving the State sole responsibility for the financing and supply of education.

III. TOWARDS THE EFFECTIVE EXERCISE OF THE RIGHT TO EDUCATION: THE INDICATORS

A. The role of indicators

44. Human rights often appear to be a call for principles, without great impact on everyday life. This is particularly the case of all the legal instruments which we have mentioned so far. For this immense corpus of rights to effectively improve the conditions of human life, and the dignity and freedom of every person, it clearly is necessary to have an "instrument" capable of measuring, according to simple and universal criteria, the degree to which the right is realized in the various countries of the world. This is the role of "indicators".

45. Until the recent studies by UNESCO and OECD, 22/ no research had, to our knowledge, proposed a coherent system of indicators relating to the right to education, from the dual standpoint of a social right and freedom. 23/ This means that, in addition to drawing up a doctrine on the right to education, efforts will have to focus on the specification of indicators which are the only means of guaranteeing as objective an approach as possible.

B. Prospects and limits

46. The undertaking is still a fairly complex one. Formulating education rights draws on concepts of a clearly subjective nature, such as, for example, personal development or human dignity, which we mentioned above.

47. How is it possible to precisely measure, with the help of statistical indicators, whether or not a State is effectively implementing an education system which is conducive to personal development? How can we measure the "performance" of a State regarding the observance and protection of the freedom of education? This is a manifestly difficult task since whoever draws up the indicators cannot become the universal conscience of education. However, it is possible, not to say vital, to set objective and measurable criteria which can be considered as minimum conditions to avoid endangering the noblest aims established for education. The indicators which need to be drawn up will therefore have to be considered as conditions necessary but not sufficient for full realization of the right.

48. This difficulty comes up again very clearly, for example, as soon as one takes up the issue of the parents' freedom of choice. It is self-evident that it is not sufficient for a State to grant this freedom, or even to finance it, for mechanical implementation of it to produce the maximum benefit in terms of personal development. But it seems clear that if the State does not grant this freedom in the concrete domain of the school and does not finance it, it will remain a "virtual" freedom, and the additional development which it was supposed to bring about will also remain merely "virtual". This means that the indicators to be formulated in this field should, on the one hand, measure the possibilities granted - which depend on both the legal framework and the concrete option of schools to choose from - and, on the other hand, the effective use made of these possibilities.

49. As soon as we try to draw up a system of indicators in a sphere so strongly linked to the personal destiny of each individual and to his or her basic choices, it is impossible to avoid giving these indicators some degree of a "policing" function, because all they can do is perhaps show which countries do not comply with a certain number of minimum standards; at no point, however, will they be able to provide a certificate of good behaviour with regard to respect for the right to education.

50. Moreover, an analysis of the quality of education should not be limited to consideration of and measures concerning the relationship between the State and the school. It is, in fact, all too clear that the education of children is not linked to the issue of the school alone: in this respect the family plays a central role which is today universally recognized by teachers; in addition, a new aspect, the media, is exerting a growing influence on the overall dynamic of education. In drawing up a system of indicators, we should

take into account these data, which will be relatively easy to do in terms of the family - as it is clearly evoked by the demand for the educational freedom of the parents - but considerably more complex with regard to the influence of the media.

51. We might be criticized here for mixing the evaluation of the granting of rights with that of the quality of education. However, closer consideration makes it clear that these two aspects cannot be separated, because the right to education for all loses all meaning if it is not focused on quality education, capable of achieving at least minimum quality. It would therefore also be appropriate to take into account indices on educational quality, particularly those drawn up by the International Association for the Evaluation of Educational Achievement (IEA). This is, therefore, a huge field of research for the years to come.

IV. AVENUES FOR FUTURE WORK

52. The fact that, in less than a year, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, and the Committee on Economic, Social and Cultural Rights have all decided to take up the question of the right to education and human rights education is surely of historical significance. This is the first time that the right has been taken into consideration by United Nations bodies dealing with the protection of human rights. The event is all the more noteworthy insofar as it is happening at the time when the international community is celebrating the fiftieth anniversary of the Universal Declaration of Human Rights and in the middle of the United Nations Decade for Human Rights Education.

53. In view of the current tendency to review the whole question of education, we may well expect a more open approach to the right to education, which is all too often considered as a purely technical, pedagogic issue, in contrast to "the developing international awareness of the importance of education, particularly in the field of human rights, for human development". 24/ And having mentioned the more open approach, we can also expect this analysis to carry the debate on educational freedom beyond the simplistic dualism in which it often gets bogged down when it takes on the nature of a claim for private interests against the State. We are too well acquainted with the deadlocks reached by sterile debate between religious and non-religious education, private and public schools, etc. The issue should therefore revolve around how to distinguish in educational policy what constitute legitimate differences, of culture and needs, and what constitute fundamental human rights.

54. We can say in all certainty that we now have the opportunity to take the issue of education out of the domain of partisan quarrels and fix it solidly in a much deeper more general consideration of the understanding we should have of the major legal instruments on human rights. Furthermore, the fact that we need to draw up indicators should give us a clearer idea of the implementation of the many facets of the right to education in the various educational policies.

55. We are aware that much time elapses between the interest generated by an issue, even at the highest levels, and the effects of educational studies on

the ground, a fact which can give rise to impatience. But the important thing is to open the debate. Political decision makers are very sensitive to trends in public opinion. It seems to us that the new complexion given to the right to education will arouse their interest and remove certain ideological barriers.

Notes

1/ "Economic growth and the international trade in education reform", in Prospects, vol. XXVII, No. 4, December 1997, UNESCO, Paris, pp. 501 et seq.

2/ For the latest developments in the area of the reform of education systems, see J. Delors, "Learning: the treasure within", Odile Jacob/UNESCO, Paris, 1996; White paper, "Teaching and learning: Towards the learning society", European Commission, Luxembourg, 1995; World Bank, "Priorities and strategies for education", Washington, 1995; and OECD, "L'Ecole, une affaire de choix", Paris, 1994. There is a good summary of the question in J.C. Tedesco, "Tendencias actuales de las reformas educativas", Lectures 3, OIDEL, Geneva, 1995.

3/ For a fuller presentation of the texts, see A. Fernandez and S. Jenkner, "Déclarations et conventions internationales sur le droit à l'éducation et à la liberté d'enseignement", Info-3 Verlag, Frankfurt, 1995.

4/ A. Fernandez and S. Jenkner, op. cit., pp. 168 and 169.

5/ The exact terms of the last preambular paragraph are: "The General Assembly, ... Welcoming the decision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities ... to place the question of the right to education, and in particular human rights education, on its agenda for the duration of the Decade" (resolution 52/127, United Nations Decade for Human Rights Education, 1995-2004, and public information activities in the field of human rights). In United Nations practice, this is extremely rare; the exception thus constituted by this reference to an as yet unwritten study means that the General Assembly is taking development of the right to education very seriously.

6/ "The right to education", in A. Eide et al., Economic, Social and Cultural Rights, Martinus Nijhoff, 1995, pp. 196 and 197.

7/ J. Delors, op. cit., pp. 91 and 92.

8/ M. Nowak, op. cit., p. 196.

9/ W. Hutmacher, "Quand la réalité résiste à la lutte contre l'échec scolaire", DIP, Geneva, 1993, pp. 147 and 148.

10/ Fons Coomans, "Clarifying the core elements of the right to education", in The Right to Complain about Economic, Social and Cultural Rights, Netherlands Institute of Human Rights, SIM No. 18, Utrecht, 1995, p. 12.

11/ J. Delbrück, "The right to education as an international human right", p. 100.

12/ J.L. Martínez, "El artículo 27 de la Constitución: Análisis de su contenido. Doctrina jurisprudencial. Tratados internacionales suscritos por España", in Aspectos jurídicos del sistema educativo, General Council of Justice, 1993, p. 19 (our translation).

13/ International Bureau of Education (UNESCO) review Prospects devoted its 100th issue (vol. XXVI, No. 4, December 1996) to this issue.

14/ F. Coomans, op. cit. p. 23.

15/ On the issue of the role of the State in this field, see World Development Report. The State in a changing world, World Bank, Washington, 1997.

16/ "Although the right to education undoubtedly also applies to university and other types of higher education, there are only very few explicit provisions in present international law protecting academic freedom and university autonomy. The only guarantees in this respect are to be found in article 15, paragraphs 3 and 4, of the International Covenant on Economic, Social and Cultural Rights, according to which States undertake to 'respect the freedom indispensable for scientific research and creative activity' and to encourage international cooperation in the scientific and cultural fields. There are no explicit guarantees of university autonomy, no right of members of the academic community to participate actively in the self-government of institutions of higher education, and no detailed provisions for the protection of academic freedom. The general freedoms of thought, opinion, expression, information, assembly and association, as enshrined in articles 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, are obviously regarded as being sufficient for the protection of academic freedom." Manfred Nowak, op. cit., p. 209.

17/ On the issue of academic freedom, reference should be made to studies by the World University Service (WUS), which led to the Lima Declaration on academic freedom and autonomy of institutions of higher education (10.9.1988). This Declaration formed the basis for UNESCO's work on the issue during the International Congress on Education for Human Rights and Democracy (Montreal, Canada, 11.3.1993). The texts can be found in full in A. Fernandez/S. Jenkner, op. cit. pp. 205 and 151.

18/ Patrice Meyer-Bisch, Les droits culturels, une catégorie sous-développée des droits de l'homme, Editions Universitaires, Fribourg, Switzerland, 1993, p. 21: "Cultural benefit is effectively the subject of ordinary law, while a human right implies, in order to correspond to the universality specific to human rights, a deeper relationship with the nature of the subject, and onto logical closeness. This is apparent from the fact that the very existence of the subject is called into question by the non-observance of one of those rights. In simple terms, the rights to culture have generally been taken to be ordinary rights (to the enjoyment of a good), and not as human rights (to exist)."

19/ ... pointing out that we are here calling for a new state of mi but it is not our role to propose accounting solutions, in the technical sense. On this issue, see White Paper, op. cit., p. 73.

20/ See the study carried out by the Basel Chamber of Commerce, "Meh Freiheit im Basler Schulsystem", June 1995.

21/ Concrete solutions exist, as is convincingly demonstrated in "Ac *de la Journée d'études sur le financement de l'éducation en Europe*" OIDEL, Geneva, 1998. Reference may also usefully be made on this issue to the stu by Bruno Mascello, "Elternrecht und Privatschulfreiheit", Schweizerisches Institut für Verwaltungskurse an der Hochschule St. Gallen, 1995.

22/ "Education at a Glance: The OECD Indicators", Paris, 1997.

23/ In 1993, OIDEL presented a written statement to the Commission Human Rights on this issue (E/CN.4/1993/NGO/25). Furthermore, in 1995, OID published a study on the state of freedom of education in the world. On th occasion, four summary indicators were formulated and used; these indicator were then drawn together into a single composite index, intended to provide summary "measurement" of the index for freedom of education in each of the countries studied. A proposal for a system of indicators can also be found an article by Audrey R. Chapman, "Monitoring the Right to Education: Report to UN Treaty Bodies", in Academic Freedom 3, Zed Books/WUS, London, 1995. S also, by the same author, "Monitoring the Right to Education: A Violations Approach" in Academic Freedom 4, Zed Books/WUS, London, 1996.

24/ Sub-Commission resolution No. 1997/7, 22 August 1997.

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